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February 23, 2005

North Conway Water Precinct
Board of Commissioners
Chair, John Santuccio
PO Box 630
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Gregory Smith, Esquire
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15 North Main Street
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Dear Commissioners and Attorneys Smith and Damon:

The Office of the Attorney General has completed its investigation and report on matters related to the North Conway Water Precinct. The report is attached.

We would like to thank all those who assisted in the investigation by providing documents and other information.

We hope that this report will assist the Precinct in going forward with providing its important services to the area residents, businesses and visitors. If you have any questions on the report, please do not hesitate to call.

Sincerely,

Elizabeth A. Dunn
Assistant Attorney General
Criminal Justice Bureau
(603) 271-3671

EAD:sch
attachment
cc: Robert Upton, Esquire
Arpiar G. Saunders, Esquire
Thomas Dewhurst, Esquire
Trp. William J. Cantwell, III/66221

REPORT OF THE NEW HAMPSHIRE ATTORNEY GENERAL'S OFFICE CONCERNING ITS INVESTIGATION OF GARY CHANDLER AND THE NORTH CONWAY WATER PRECINCT

In November 2003, Attorney Greg Smith of the McLane, Graf, Raulerson and Middleton, P.A. law firm (hereinafter McLane) contacted the Office of the Attorney General about concerns of possible criminal activity at the North Conway Water Precinct (hereinafter NCWP). In addition to Attorney Smith's concerns, various individuals and groups, in letters and in telephone calls to our office, have raised questions about actions by NCWP employees and commissioners. Our office, with the assistance of the New Hampshire State Police, has investigated these claims. Our investigation confirmed the legitimacy of concerns regarding the mismanagement of public funds at NCWP and the failure of former precinct superintendent Gary Chandler to establish and enforce appropriate controls and managerial supervision at NCWP. Under these circumstances, the Attorney General's Office conducted a thorough review of all allegations raised to determine whether the conduct of any public official or employee at NCWP warranted the commencement of criminal charges for theft, public corruption, or witness tampering. Our investigation has revealed insufficient evidence to commence such a criminal prosecution. However, the findings documented in this report and a report by Municipal Resources Incorporated (hereinafter MRI) should compel NCWP customers and commissioners

to carefully examine the existing structure, administration and future oversight of the NCWP.

I. BACKGROUND

A. Sources of Information

In recent years, the McLane law firm has provided legal services to NCWP. The precinct commissioners instructed McLane to cooperate with the Attorney General's Office in its investigation of the precinct. Attorney Smith provided the Attorney General's Office with the copy of a report prepared by MRI. At the request of the NCWP commissioners, MRI had done a review of precinct operations, and had prepared a report setting out the issues it had found.[1] The McLane firm also provided us with materials it had gathered in the course of its investigation, including a report of an April 2003 interview of Gary Chandler, the former precinct superintendent. McLane also provided copies of letters that Chandler had written to the commissioners and others.

Attorney Thomas Dewhurst, the precinct's general counsel, was interviewed and provided documents.

New Hampshire State Police Trooper William Cantwell was the lead investigator. He interviewed witnesses, including former precinct superintendent Gary Chandler[2]. He obtained background investigative reports used in the MRI final

[1] The MRI report is the basis of many of the matters addressed in this report. However, many other topics raised in the MRI report relate to administrative or accounting practices, not allegations of criminal conduct, and are therefore not addressed in this report.
[2] Chandler's attorney, Robert Upton was present during the interview.

report. Tim Pickel, a former state trooper who acted as MRI's investigator, also provided Cantwell with information.

Prior to this investigation, Senior Assistant Attorney General Orville "Bud" Fitch had investigated allegations of wrongful voting in the NCWP 2003 annual election. His investigation and report related to voter eligibility, and his conclusion, as reported in a May 2004 letter to the commissioners, was that the Office of the New Hampshire Attorney General would take no action on the matter. Information gathered in that investigation was used for this investigation.[3]

Attorney Arpiar Saunders, representing a local group called the "People's Alliance for Good Government" (hereinafter PAGG), sent a letter from PAGG alleging certain other wrongdoing within the precinct and gave information related to the topics of our investigation. The sources of some of the information in the PAGG letter are not identified.

In addition to the above materials, we have reviewed videotapes of the precinct annual meeting, numerous news articles and other miscellaneous materials.

B. **The Water Precinct**

NCWP is a unique public entity set up in 1905 by a vote of the state legislature. It provides water, sewer, and fire protection services to some parts of the towns of Conway and Bartlett. The governing body of the precinct is a three-member board of commissioners elected by vote of the residents of the precinct, and operating

[3] SAAG Fitch's report covered the 2003 election. Although there were references to problems with the 2002 election in that file, there was no formal report concerning the 2002 election.

on a budget voted at an annual meeting. On a day-to-day basis, the precinct's operations are overseen by a precinct superintendent.

On August 15, 2003, following an investigation by the McLane firm, the commissioners placed then-superintendent Gary Chandler on administrative leave. Chandler had been superintendent since 1990. On October 22, 2003, MRI released its report on the operation of the precinct. In December 2003, the commissioners terminated Chandler's employment. Chandler and his attorney, Robert Upton, sent letters to the commissioners regarding various allegations that had been made in the McLane and MRI investigations. In a November 12, 2003, letter, Chandler alleged that precinct employees were gagged and stifled during the McLane and MRI investigations, and that they had been thereby prevented from giving complete reports to investigators. He also commented on many sections of the MRI report. Chandler stated:

> In most cases [the commissioners] had given me the authority to act on their behalf with the exception of those functions, which they had to lawfully execute themselves. Administrative, accounting, and supervisory practices were known and acceptable to the Boards, and other professional and regulatory entities. (Auditor, DRA, DOL etc.) Virtually everything I have done for the past 14 years was reported to the Commissioners and approved by them. …
>
> The handbook and safety manuals were known and designed to contain rules and requirements that were to be used if and when necessary, this was a canned package and although adopted was not in all cases consistent with actual practices. … Again the actual practices where different from the handbook were known by the Commissioners and approved.

A 1995 organizational chart of the precinct shows that the superintendent was responsible for oversight of the water, sewer and fire departments as well as the administrative employees of the precinct.

II. ANALYSIS

The purpose of our investigation was to determine if there was evidence that any NCWP employee or commissioner had violated any criminal statutes, and, if so, whether or not the evidence supported the filing of criminal charges. The investigation was not intended to determine if NCWP operations violated any civil statutes or regulations, *e.g.*, municipal budget reporting requirements, or whether the precinct was properly managed.

In order for the State to file a criminal charge, there must be a violation of a section of the criminal code or of some other statute that contains specific provisions for criminal penalties for violations. We evaluated potential criminal charges mindful that the State must prove each element of any crime charged, and must prove the elements beyond a reasonable doubt. To prove a violation of a criminal statute, the State must prove the person acted with the mental state specified in that criminal statute, *i.e.*, purposefully or knowingly or recklessly. A prosecutor has a professional responsibility not to bring a charge unless it is supported by probable cause. N.H. Rule of Professional Conduct 3.8. Whether to prosecute and what charges to file are decisions that rest within the discretion of the prosecutor. State v. Peck, 140 N.H. 333, 334 (1995).

Under a provision in New Hampshire's statute of limitations, RSA 625:8 III (b), for any offense (violation, misdemeanor or felony) based upon misconduct in office by a public servant, a person may be prosecuted while the person is in the public office, or anytime within two years thereafter, even if the standard limitation has already run.

As to each of the issues where criminal activity has been alleged, the following is a summary of the relevant available evidence, the potential criminal charges and an analysis of the viability of any charges.

1. Theft of Services – Water

The MRI report alleged that some water customers, including two precinct employees, received "free" water. MRI estimated that the potential loss to the precinct was $80 to $100 per year for each of the employees' households.

In June 2003, after McLane had begun an inquiry into the precinct, Gary Chandler asked Shane McKinney, the precinct's water meter and backflow coordinator, to provide him with a list of accounts where there had been reports that water was unmetered or backflow prevention devices were missing. (McKinney was the employee responsible for the inspection of these devices.) McKinney compiled the list, with some of the information coming from Arthur Hill, assistant water foreman, and Curtis Hodgdon, a water precinct employee.[4] Among the accounts listed were Fire Chief Patrick Preece's household and Deputy Fire Chief Tim Anderson's household.

A. The Preece Property

On October 15, 2003, Jeff Towne of MRI gave McKinney a list of eight sites where water systems were to be immediately inspected for meter or backflow violations. One of the sites was the Preece property. On that same date, McKinney and Pickel inspected the water service at the Preece property. They found a tee that

[4] Some of the accounts were listed for questions about backflow devices, and some were listed because of known temporary problems, *e.g.*, freeze problems. McKinney and/or MRI personnel did follow-up on these accounts.

had been capped with some flux still adhering.[5] Preece stated that the tee was put there so that they could drain the house, but it had not been used for that or any purpose.

McKinney said Chandler had told him that he had helped Preece install the tee a few years earlier because they wanted to hook up a gauge to monitor pressure on that street. Pickel and McKinney later looked at precinct records but did not find any complaints about water pressure. McKinney stated that Arthur Hill had told him about a bypass at the Preece property, and that a plumber working in the home had also noted it. Cantwell interviewed the plumbers, but did not gain any useful information. Roger Woodward, the precinct water foreman, stated that he had heard rumors about Preece receiving free water.

Preece told Cantwell that when road construction damaged his water line, a new line was put in to his house, and at that time a tee with a plug was put in to allow for pressure monitoring. He said this was not standard, but had been done because he was a precinct employee. No monitoring has been done at this tee. Preece said that he used the ground water from under his pool to fill the pool, and that this ground water could also be used for irrigation. He said that his water consumption was high the previous summer (2003) because he planted sod near the pool and used metered NCWP water to keep it growing. He had not yet hooked up the groundwater system for lawn irrigation. He said that he had invited Chandler to come and inspect the setup when Chandler questioned him.

[5] As used here, a "tee" is a T shaped pipefitting that allows for a connection to the pipeline.

Precinct records show that the Preece household water usage per quarter since 1997 held at approximately the same level (10 to 17 thousand gallons per quarter) until the third quarter of 2003 when it spiked (29 thousand gallons). This is the same time period as when the issue of unmetered water use was raised and the same time period when Preece reports watering his new sod.

B. The Anderson Property

Roger Woodward told Cantwell that he was aware Anderson had a tee that the precinct had used to run off dirty water, but he never heard that Anderson received free water. He said that there is now a flushing valve on the water line at a point beyond the Anderson residence.

Former precinct meter coordinator Mike Galligan reported that he saw a pre-meter hookup at the Anderson residence sometime in the 1980s. He had assumed it had been corrected.

McKinney told Cantwell that in 1998 he had seen a pre-meter sill cock[6] hooked to a lawn sprinkler at the Anderson house. He said he mentioned this to Joe Smith, sewer foreman, and Mike Galligan, who was the meter coordinator at that time, and was told not to talk about it. In June 2003, when he discussed the aforementioned list with Chandler, Chandler said that the Anderson sill cock had been used to drain the rusty water that had been a reoccurring problem on that street before the 1998 water main replacement. McKinney said that when there had been complaints of rusty water, they had used the flushing device at the end of the road.

[6] A "pre-meter" or bypass device is one that is connected to the water supply pipeline before the water meter. Such a device would allow the use of water that is not metered and therefore not billed to the user. A sill cock is an outdoor water connection, typically a faucet that is connected to an outdoor hose.

Arthur Hill told Cantwell that in the past they had used the sill cock at Anderson's house many times to drain water when there were complaints of discoloration in the system. He thought that the sill cock was to have been removed at the time the line was repaired and a flushing device installed on the line. Hill thought that the precinct's auditor, Joe Santorro, audited the employee water bills every quarter.

In 1998, at the time of repairs in the area, Chandler and McKinney had discussed the fact that there was a bypass at the Anderson house so that the precinct could "bleed" water due to repeated water discoloration problems. Chandler told McKinney that he would make sure that Anderson removed the bypass.

On October 15, 2003, McKinney and Tim Pickel (of MRI) attempted to inspect the Anderson water line but were refused entry by Mrs. Anderson. McKinney spoke on the phone with Deputy Chief Anderson who said that the tee had been removed five years ago. On October 16, Peter Russell (of MRI) wrote to the Andersons about the precinct rule that allows the precinct to inspect all water meters and fixtures "at all reasonable hours." On October 20, 2003, Roger Woodward and Peter LaBonte (of MRI) inspected the Anderson water line. Their written report stated that all water flows through the meter, that there was a capped tee between the water service line and the meter, and it appeared that the tee had been capped some time ago.

In his November 12, 2003 letter, Chandler stated that he had authorized a "bleeder" at Anderson's house when there had been water problems in the area. He

stated that the bleeder was to be eliminated when the new water main was installed several years ago. He denied knowing of any employees receiving free water.

Precinct records showed that the Anderson household average use was slightly above the minimum, and had not spiked any quarter since 1997. MRI estimated that a four-person household with an irrigation system and a day care facility would use significantly more water.

C. Legal Analysis

Under RSA 637:8, a person commits theft of services if he obtains services which he knows are available only for compensation by any means designed to avoid due payment for those services, or, if having control over services - such as a water supply- he diverts the services to his own benefit. Here, there is insufficient evidence to prove beyond a reasonable doubt that either Preece or Anderson obtained water for personal benefit without payment for the water. Although there is evidence that there had been connections installed before the meter, proof is lacking that the connections were used for unauthorized purposes. There is evidence that at some point, there was an authorized purpose for the pre-meter devices. Therefore, based on the available information, insufficient evidence exits to file any charges related to theft of water services.

Under RSA 643:1, a public servant is guilty of the misdemeanor of official oppression if, with a purpose to benefit himself or another, he knowingly commits an unauthorized act which purports to be an act of his office, or if he knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office. Here, Chandler allowed unmetered connections in both households. It could

be a violation of this statute if Chandler knowingly allowed the connections so that these employees could use unmetered water. Here, however, there is evidence suggesting that the unmetered connections were intended for a legitimate use, and the State could not prove beyond a reasonable doubt that the connections were intended for an illegitimate purpose. There is insufficient evidence for any charge of official oppression.

2. Theft by Misapplication- Scrap Metal

The MRI report alleged that for several years, employees received funds for the sale of scrap metal that was the property of the precinct. Several witnesses reported that employees collected scrap metals while on the job and that the scrap was stored on precinct property. It was eventually loaded into a private truck and brought to a metal dealer and sold. The proceeds of the sales were distributed to certain employees, including Chandler. This practice was followed for 7 or 8 years, and each load was reported to yield $1500 to $2000. Hill told MRI that the involved employees received about $200 each. Galligan said that a truckload yielded $400 to $600 and that each man would receive $50 or $60.

In his November 12, 2003, letter, Chandler wrote that the scrap metal was a combination of materials collected during precinct work and materials received from private jobs and contractors. He said that employees brought the metal to various junkyards in private vehicles on personal time. He said that the practice existed from before 1990 until the mid 1990s, but that in 2001 the money went into an NCWP account and the commissioners approved the use of the funds for the purchase of an outdoor grill at the precinct.

Chandler told Cantwell that this practice did occur, that the money was distributed to employees, and that past commissioners were aware of the practice.

Cantwell and another trooper spent many hours going through the records of one of the scrap metal dealers reported to have been used, Harding Metals in Northwood, looking for receipts of these sales. Harding employees said that they often record the name of the person selling the metal. There were no receipts found in the name of the precinct or known precinct employees. Some precinct employees had indicated that the metals went to different scrap dealers at different times.

Former commissioner Richard Forbes said that he was aware of a long-term practice of the employees getting rid of scrap metal. He said he did not know what they had received for the metal, but at times it had cost the precinct money to get rid of the metal. In his opinion, the metal did not belong to the precinct anyway. Former Commissioner Brian Preece told Cantwell that he was not aware of the practice until the time of the investigation. Commissioners Duane and Santuccio were also not aware of the practice prior to the investigation.

Under RSA 637:10, a person commits theft by misapplication of property when the person obtains property of another, subject to a known obligation, if the person purposely or recklessly deals with the property as if it was the person's own. Here, there is clear evidence that for several years Chandler and other employees obtained funds from the sale of precinct scrap metal, that is, they treated the scrap metal as if it was their own. (Even if some of the metal originally came from "private" contracts, it was collected in the course of precinct business and was

eventually in the possession and control of the precinct. It should therefore be considered the property of the precinct.)

This practice raises serious concerns about the distribution of public proceeds to precinct employees over and above their publicly documented salaries. However, precinct employees who obtained extra money for scrap metal had authorization from Chandler to collect the funds. This fact would preclude any criminal prosecution for theft against them. Similarly, although Chandler's approval of and participation in this long standing practice raises legitimate concerns about his management practices, at least one commissioner knew about and acquiesced in what the commissioner described as a "long standing practice." This testimony would undermine the State's ability to prove beyond a reasonable doubt that Chandler had illegally converted public property without authorization. Further, without receipts or other documentation, the amount of the loss to the precinct would be an estimate.

Under RSA 643:1, a public servant commits official oppression if he knowingly commits an unauthorized act which purports to be an act of his office, with a purpose to benefit himself or another. Based on the conflicting testimony about whether the commissioners had authorized the distribution of scrap metal proceeds to Chandler and other employees, the State could not prove beyond a reasonable doubt that Chandler committed official oppression.

3. <u>Personal Purchases through the Precinct</u>

The MRI report alleged that there were inadequate controls on purchasing for the precinct. In addition, MRI alleged that employees of the precinct had used the precinct's suppliers and charge accounts to make personal purchases.

Chandler told both Cantwell and McLane that there had been a practice in the past where employees could make purchases, *e.g*. tires and auto parts, through the precinct accounts and then pay back the precinct for the items. He said that some employees had failed to pay on a timely basis. Consequently, on March 16, 2000, Chandler wrote a memorandum stating: "Effective immediately, employees of the North Conway Water Precinct may no longer purchase any materials, goods, etc, through the Precinct. Employee charge accounts are cancelled and all personnel with account balances are expected to pay in full the obligations by April 30, 2000." Chandler told Cantwell that after a while some employees, including himself, resumed the practice. He said the employee purchases are on an honor system. He said that for many years the precinct has acted as a supply house for employees, local contractors and for itself.

Kris Cluff, the precinct officer manager, is responsible for billing out accounts receivable. She told Cantwell that employees would turn in invoices that were marked as "personal use." Cluff said that about 10% of employees still charged items. She brought this to Chandler's attention, and he said he would address these employees. Hill told MRI that he knew there was a no-purchase policy, but that "nobody follows it."

Commissioner Santuccio stated that he was unaware of the practice of purchases by employees until the time of the investigation. Former commissioner Preece said that other than one instance, he was unaware of the practice. Former commissioner Forbes told Cantwell that "going way back" there had been a practice of allowing employees to purchase through the precinct. He said that there were

problems with payment of bills, and then employees were told that they could no longer do this. He did not remember seeing Chandler's memorandum but knew the issue had been decided. He was not aware that the practice had continued and agreed that if it had resumed, it would be a violation of the policy.

MRI did an examination of purchase records and provided our investigator with copies of the records. Our investigation did not include any additional examination of these records. MRI documented 47 instances involving 10 employees, including Chandler, between March 16, 2000 and September 3, 2003, in which employees had charged items to the precinct and had been billed for the items by the precinct. There are no known outstanding balances.

Chandler's decision to allow himself and other employees to charge personal purchases on public charge accounts was a clear violation of existing NCWP policies. However, there is no evidence that Chandler or other employees committed a theft. Our investigation did not uncover any instances where Chandler or other employees failed to reimburse NCWP for personal charges made on public charge accounts.

Although our investigation did not reveal specific instances where this practice resulted in a theft from the precinct, the potential for theft due to non-reporting or non-reimbursement is enormous.

4. Use of Precinct Facilities and Supplies - Trailer for Personal Business

The MRI report alleged that employees used the precinct facilities for a number of different personal purposes. In one case, in early 2003, Joe Smith, sewer

foreman, and Arthur Hill, assistant water foreman, built two trailers at the precinct garage. One was for the precinct, and one was for their own use (see below).

Hill told Pickel that Smith had obtained the trailer axles from a local mobile home park owner who had borrowed equipment from the precinct on several occasions to search for underground utilities at the park. Hill told MRI that the deal had been worked between the park owner, Chandler and Smith. Hill ordered steel and other materials for both trailers through the precinct. They used precinct equipment to construct both trailers. Hill said that the work on the personal trailer was done after work hours, but that the work on the precinct trailer was done during work hours. He said that they completed the precinct trailer and then constructed the personal trailer. He said Smith registered it in his name. Hill said that they waited for all the bills to come in and then Jen Fall, the precinct's secretary, provided them with copies of the bills, which Smith paid by check with his own funds.

McKinney reported that work on the personal trailer was done on nights and weekends and on precinct time. McKinney said that Smith had driven the trailer without a registration.

Cluff said that Smith asked for a tally of the costs for the personal trailer, and then made out a check for the tallied amount. She said she did not know how to separately calculate the portion of the shipping costs attributable to the personal trailer. Cluff said that the bills were provided to Smith after the trailers were completed, and that they had worked on the trailers in January through March 2003. Precinct documents show that Smith was billed for steel and other supplies, which he

paid for, but not billed for any incidental costs (nuts and bolts, etc.) or shipping and welding costs.

In his November 12 letter, Chandler wrote that Smith and Hill had received three sets of trailer axles. He agreed that Smith and Hill could build a trailer for themselves along with a trailer for the precinct, but that they were to build their trailer after hours and at their expense. Chandler said he intended for Smith and Hill's incidental costs, such as for welding on their trailer, to compensate them for the work that they did on the precinct trailer after normal working hours. He stated that all this work was done in the open and that the commissioners were aware that it was occurring.

Former Commissioner Richard Forbes said he was aware the trailers were being built, and that the work was done in plain view. Former Commissioner Preece told Cantwell that he knew the precinct trailer was being built, but did not know about the other trailer until the investigation by MRI. Sheila Duane, elected commissioner in March 2003, did not know of the trailers until the time of the investigation. Commissioner Santuccio stated that he did not know about the trailers at the time they were built.

Although Chandler allowed the use of the axles in Smith and Hill's trailer, the axles were given to NCWP in exchange for the repeated use of precinct equipment. The axles should therefore be considered the property of the precinct.

Here, Smith and Hill used the axles, the precinct facilities, and incidental and welding supplies as if they were their own. Under RSA 637:3, a person commits theft by unauthorized taking when the persons exercises unauthorized control over the

property of another with a purpose to deprive the other thereof. Although Smith and Hill exercised control over precinct property in such a way as to deprive the precinct of its use, it is clear that Chandler "authorized" them to do so. Under these circumstances, a criminal prosecution against Smith and Hill for theft is not appropriate.

A person is an accomplice to a crime if, with the purpose of promoting or facilitating the offense, he aids another person in committing the crime. RSA 626:8. Chandler aided Smith and Hill in constructing their personal trailer using precinct property, knowing that they intended to use the trailer for personal business. Charges against Chandler for official oppression or accomplice to theft were also considered.

Several considerations warrant against holding Chandler criminally liable for this misuse of public property. First, Chandler argues that NCWP did not bill Smith and Hill for the incidental costs of building their personal trailer at NCWP in consideration for uncompensated overtime work performed by Smith and Hill when building the precinct's trailer. There is insufficient and inadequate documentation of overtime work on this project for the State to disprove Chandler's claims of legitimate overtime compensation. Second, Chandler claims that the commissioners had authorized construction of the personal trailer at NCWP. While three of the commissioners denied this allegation, one commissioner acknowledged his awareness of the project. This evidence would make it difficult for the State to prove beyond a reasonable doubt that Chandler had not obtained approval from the commissioners for this arrangement. Third, given that Chandler exercised broad and unchecked discretion in overseeing the operations at NCWP, it would be difficult to establish that

his decisions, although clearly inappropriate and contrary to the best interests of the public, did not fall within his discretionary authority as precinct superintendent. For all of these reasons, the State cannot initiate theft or official oppression charges for construction of the personal trailer at partial public expense.

5. Other Personal Use of Precinct Facilities

The MRI report alleged that employees used precinct facilities, equipment, materials and supplies after hours for sideline business activities.

McKinney told Cantwell that Fire Chief Preece used the precinct facilities to work on firefighters' or other persons' vehicles, and that he received payment for the work. Chandler told Cantwell that he knew Preece was installing radios but it was generally for fire personnel. He said he was not aware of anyone working on vehicles for profit, although they might have received "ten bucks or a six-pack" for working on someone else's vehicle.

Hill told MRI that he had worked on his own vehicles as well as a septic truck (for pay) after getting permission from Chandler to do so.

The MRI report also alleged that employees used precinct facilities and equipment to work on their vehicles after work hours, despite a policy prohibiting such use. In his November 12 letter, Chandler admitted that this practice occurred and asserted that any materials used were paid for by the employees. Chandler told Cantwell that this practice was known to the commissioners and created good employee relations. He said that no one had ever been told to stop using the garage. He also said that he knew there was a written policy prohibiting such a practice.

Former Commissioner Forbes told Cantwell that employees and residents used the precinct facilities to work on their cars and the like. He said that employees reimbursed the precinct for any supplies they used except for car wash soap. Commissioner Santuccio was aware that employees had used the fire station for personal use, but did not know of personal use of other precinct facilities. Former commissioner Preece said that there had been a long-standing practice of use of the fire station, and that the precinct facilities had been used for washing or fixing employees' vehicles.

Use of precinct facilities for private benefit may constitute theft. Here, however, the practice was known and acquiesced to by some commissioners. Under these circumstances, criminal prosecutions of NCWP employees are not supported by the evidence.

6. Conflict of Interest Provisions of Construction Project

In the past several years, NCWP has been involved in several large sewer and water system expansion projects. These projects were funded in part by state and federal programs and were put out to bid under contracts that contained terms required by the state and federal programs. Among the requirements of "Contract Three" are provisions that prohibit the owner (here, NCWP) or the owner's employees from engaging in the administration of the contract if a conflict of interest would be involved. Further, there are requirements that all work changes must be authorized in writing, that the contractor must comply with OSHA provisions, and that the contractor is prohibited from giving gratuities to any official or employee of

the owner in an attempt to secure favorable treatment in making any determination related to the contract.

The contract clearly identifies conduct that would constitute a conflict of interest.

> 4.2 The OWNER's officers, employees or agents shall not engage in the award or administration of this CONTRACT if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when: (a) the employee, officer or agent; (b) any member of their immediate family; (c) their partner, or (d) an organization which employs, or is about to employ, any of the above has financial or other interest in the CONTRACTOR. The OWNER'S officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from the CONTRACTOR or subcontractor.

RUS Bulletin 1780-14 page 3.

Joe Smith, the precinct sewer foreman, and Arthur Hill, precinct assistant water foreman, performed work directly for a contractor, Alvin J. Coleman & Son, Inc., on "Contract Three." They constructed sewer inverts and water service connections, using the personal trailer that they had constructed at the precinct. They were paid by Coleman according to the number of inverts or connections they completed. They each received $13,725.00 for their work.

Hill told Pickel that he was not given 1099 tax forms by Coleman, and there were no income taxes taken out of his check. Hill said that the work was not done on precinct time and that they used Coleman's supplies and equipment, not the precinct's. Although he knew that OSHA required it, Hill said he and Smith did not use safety equipment even though the equipment was available in the Coleman trailer. He said that the state inspector inspected all their work and that the inspector went

into the work holes without safety equipment. Hill told MRI that Chandler, the project engineer from Camp, Dresser and McKee, Inc. (hereinafter CDM) and the state inspectors knew they were working without safety equipment. According to Hill, "They were out there when we were there and nobody said anything."

Hill told Cantwell that Smith had approached him about doing the invert work, reporting that Noah Coleman had approached Smith. Hill had some tools, they bought some equipment, they borrowed some from Coleman, and they used the trailer they had built. He said they did not use precinct equipment while doing the work. He said that besides the work on Contract 3, they had also done some work for the Town of Conway. When they were working in Conway, people stopped and questioned why precinct employees were working in Conway.

In his September 30, 2003, letter to the commissioners, Chandler wrote that prior to the initiation of Smith and Hill's work, he discussed the concept with CDM, Gregg MacPherson of Rural Development (RD), Ray Cushman of the New Hampshire Department of Environmental Services (hereinafter DES), Coleman, and the Board of Commissioners. He wrote that all parties were aware of the relationship, and that specific precautions were taken to insure that Smith and Hill's work was inspected by both CDM and DES. Chandler's November 12 letter stated that he believed DES and RD reviewed this work and told him that there was no violation of the rules, regulations or law in the contract's grants or loans. Ray Cushman of DES was contacted concerning Chandler's claims. Cushman confirmed that the issue of NCWP employees performing work directly for Coleman was discussed. He does not remember the identity of the NCWP employees at issue but does recall Chandler

asking whether such an arrangement violated any rules or regulations. Cushman recalls replying, "not that I am aware of," or words to that effect.

Chandler told Cantwell that he knew Smith and Hill were doing the work, that he had talked to the state and engineering representatives, and that they did not have a problem with the arrangement. He also said that the arrangement was apparent to the public, and that the commissioners were aware of the situation. He said he had no knowledge of how Smith and Hill were paid, what account Coleman used to pay them, or what was done about their tax situation. He said it was not his business how they were paid. He said that it was up to Coleman to enforce safety provisions on company employees.

However, in his McLane interview, Chandler said that there had been long-term joking at the precinct about the work being done "under the table." He also told McLane that he did not know if Smith and Hill were appropriately insured and that they probably did not have safety equipment.

Chandler said that on a private construction project such as a commercial building, Smith might act as inspector. On a publicly funded project, Smith would not have the same authority.

Kris Cluff, the precinct's office manager, told Cantwell that she had not seen documentation of the payments to Smith and Hill. She said that CDM, Coleman, Greg MacPherson and Ray Cushman all knew that Smith and Hill were doing the work.

However, McKinney contradicted the statements of Chandler, Smith and Hill. McKinney told Cantwell that Smith and Hill had used precinct equipment while doing

this work. He said that they bragged about doing the work "under the table" and how they were paid per invert or per water service.

Commissioner Santuccio and former commissioner Preece said that they were not aware that Smith and Hill had done this contract work until the work was reported in the McLane and MRI investigations. Former Commissioner Forbes said that he was aware that Smith and Hill were doing the work, and did not think that it was a conflict of interest. He said that he does not remember any discussion of this matter with the other commissioners, but acknowledged that it might have occurred. Forbes said he did not specifically authorize the work, but that he did not object to it.

In a May 19, 2004 letter to the commissioners, a Coleman official wrote that Smith and Hill were hired as subcontractors and that Smith and Hill were each paid $13,725 for the work. Smith and Hill did not produce invoices to the company, but Noah Coleman was aware of what work they had completed, and checks were issued accordingly. The letter also stated that before Smith and Hill started the work, Coleman had asked Chandler if there would be a "problem or any conflict of interest," and that Chandler had assured them that there would not be since Smith and Hill would do the work on personal time.

Even though Smith and Hill did not submit invoices to Coleman for payment, Coleman provided documentation of the number of inverts and connections that they had constructed for Coleman. That documentation was obtained and reviewed during the investigation.

Under RSA 643:1, a public servant is guilty of the misdemeanor of official oppression if, with a purpose to benefit himself or another, he knowingly commits an

unauthorized act which purports to be an act of his office, or if he knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office. Here, there is evidence that Chandler authorized Smith and Hill to work for and receive payments from Coleman after Coleman was awarded a public contract with NCWP. However, that arrangement clearly violates the terms of the contract's conflict of interest provision. This is particularly clear where the contract prohibits a conflict of interest, "real or apparent."

To establish the offense of official oppression against Chandler, the State would have to prove beyond a reasonable doubt that Chandler was aware that he should have prohibited Smith and Hill from working for Coleman based on a conflict of interest, and despite this knowledge, Chandler nevertheless authorized Hill and Smith to complete the work for their own benefit, for Coleman's benefit, or for Chandler's benefit.

The State cannot prove that Chandler believed that a conflict of interest should have prohibited Hill and Smith from working for Coleman. To the contrary, Chandler expressed his belief that no conflict of interest existed, and he claims to have alerted the commissioners and other state officials about his approval of the hiring. Absent evidence that Chandler knowingly approved a working relationship between Coleman, Smith and Hill that was either illegal or unauthorized, his approval of Smith and Hill's work for Coleman would not constitute official oppression.

There is evidence that Chandler also knew that Smith and Hill were working without proper tax provisions and without the proper safety equipment, yet did not act to prevent this. Additionally, some individuals have alleged that Coleman refrained

from enforcing OSHA workplace safety requirements, workman's compensation and liability insurance requirements, and federal/state tax reporting requirements in connection with Smith and Hill's work for Coleman.

A question arises whether Chandler, as the precinct supervisor with overall responsibility for supervision of precinct affairs, knowingly refrained from performing a duty clearly inherent in the nature of his office, *i.e.*, enforcing contract requirements, safety regulations, tax provisions and insurance requirements on a precinct project. However, although Chandler acknowledged hearing rumors that Hill and Smith were paid under the table, Chandler denied actual knowledge of how Coleman paid Hill and Smith, and the State lacks evidence to demonstrate otherwise beyond a reasonable doubt. It would also be difficult to prove that Chandler's lax enforcement of safety regulations and insurance provisions amounted to the criminal offense of official oppression.

7. <u>Use of Precinct Facilities</u>

In the latest major project, the precinct awarded a construction contract to George Cairns and Son, Inc. In his McLane interview, Chandler said that after the bid was awarded, he recommended that Cairns be allowed to use the precinct property for the project trailers and headquarters instead of renting elsewhere at an additional cost. Precinct attorneys then drafted a contract outlining the terms and payment for Cairns' use of the precinct's space. Chandler recommended against the contract, and Cairns moved onto the site without any contract. Chandler said that he considered it a benefit to the precinct to have Cairns on the site and readily available for interaction with precinct officials. Commissioner John Santuccio said he and the other

commissioners knew that Cairns was occupying the site, knew that there was no contract in place, and said that he believed there was an informal agreement.

Permitting this use of precinct property without a contract may create civil issues. There is, however, no evidence of any violation of criminal statutes related to Cairns' use of the precinct property.

8. Bid Specification Change

The same contract with Cairns included a provision for the purchase of fire hydrants. Cairns indicated that it had met the bid specifications with a new model hydrant and did not want to pay the higher price for the standard model that the precinct had used in the past. Chandler told McLane that the precinct did not want to change hydrant models. Chandler arranged a deal where the E.J. Prescott supply house, his former employer, would sell the standard model to the precinct at the same price as the new model would have cost, and then Cairns would pay for the hydrants. Chandler told McLane that if this had originally been calculated as part of the bid, Cairns would still have won the bid.

There is no evidence that Chandler or any other employee financially benefited as a result of this transaction. Under RSA 643:1, a public servant is guilty of the misdemeanor of official oppression if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of office, or refrains from performing an official act. Here, there is no evidence that Chandler was unauthorized to make the arrangement with the supplier so as to keep the use of the same hydrant. Although there was the benefit of added sales volume for the supplier, there was also a benefit to the precinct in a

continuing standardization of hydrants. Thus, the evidence does not support a criminal charge related to this matter.

9. Use of Precinct Gasoline

There were some allegations that precinct employees used precinct gasoline in personal vehicles. Chandler told McLane investigators that there was no policy concerning the use of precinct gasoline in personal vehicles, and that there was an honor system for certain employees. If such employees used a personal vehicle for precinct business, they could either fill their tank with NCWP gasoline or be reimbursed for mileage. Several employees confirmed this practice.

Although this practice creates a potential for theft, there was no specific evidence of theft of gasoline by NCWP employees.

10. Paving at Fire Department with Contract Materials

During one of the major sewer projects, "Contract 3," Coleman delivered and spread some asphalt in the driveway of the fire station. The asphalt had originally been destined for the sewer project. There were reports that several employees spent time at the fire station preparing the driveway for the paving.

Chandler told Cantwell that there was a bookkeeping transfer from one account to another to document the transfer of the cost of the asphalt. (There is documentation showing that there was an accounting for some pavement costs going to the fire department.) Chandler also said that the commissioners knew about this work, and that one of them, Forbes, was present while it was being done. Chandler told McLane, "I view that we're all the same pair of pants, we just have different pockets to choose from."

Precinct office manager Cluff told Cantwell that Chandler informed her it was excess asphalt. She thought the cost of the asphalt was about $2400. She said that when she became aware of the asphalt use at the fire station, she reported it to the auditor, and she then booked the expense as a liability to the capital projects account of the fire department.

Chandler told McLane that: (1) the asphalt was simply excess on the trucks at the end of the day, (2) it was a good deal for the precinct, and (3) the pavement was provided in exchange for paying for the fire department personnel and vehicles standing by on the other side of the construction project while traffic was interrupted. (The contractor could have been billed for the firefighters' time while the road was closed.)

Former commissioner Forbes said that he was aware of the paving at the fire station, but that he was not present when it was done. He said he was aware that there were "IOUs" going back and forth. He said that the paving had been properly accounted for. He believed that Chandler and the contractor informally kept track of when they helped each other out, rather than always creating a change order in the contract. He was not aware of any agreement about road closure costs offsetting paving costs, but if there was, he would not be concerned since it all comes out of the same pocket and saves taxpayers money.

There is no indication that any person received a personal benefit from this transaction. Under RSA 641:7, a person is guilty of the misdemeanor of tampering with public records if he knowingly makes a false entry in government records, or presents a document into the government record while knowing the document is false.

Here, the accounting of the pavement cost may not have occurred if Cluff had not alerted the auditor and made the transfer to the proper account. This evidence, however, does not support a charge for tampering with public records or any other crime related to this transaction.

11. Improper Election Activities

The MRI report alleged that certain precinct employees were improperly engaged in precinct election activities. The MRI report found the behavior "absolutely contrary to sound and generally accepted public management practices and principles." The MRI reports and our investigation show that employees were involved in election campaign activities in 2002, specifically supporting John Santuccio as a write-in candidate for commissioner. Employees engaged in this activity while on the job and while using precinct facilities and supplies. For example, McKinney reported that Chandler instructed him to make 200 copies of an election flier on the precinct copier. Chandler then invited NCWP employees to Deputy Fire Chief Anderson's home for a pizza party to prepare the fliers for mailing.

In his November 12, 2003, letter, Chandler stated that he exercised his First Amendment rights to support the candidate of his choice. He disagreed with MRI's conclusion that his actions were unethical.

The PAGG letter alleges that McKinney was an instigator of the election activities, made the copies, delivered them to the Anderson home, and told Mrs. Anderson not to say where they came from. Jen Fall, precinct secretary, is reported to have said that Chandler was not in the office on the day the election fliers were prepared.

In a letter to Senior Assistant Attorney General Fitch, Sheila Duane, who at the time of the election had been a commissioner and was also a candidate on the election ballot, wrote that during the 2002 election, a candidate who was on the ballot and Chandler, an organizer of candidate Santuccio's write-in campaign, were involved in official functions such as handing out ballots.

Candidates who are on the election ballot are prohibited from performing election functions. See: RSA 658:24. Also, RSA 659:44 provides for misdemeanor penalties for electioneering at a polling place. To electioneer is "to act in any way specifically designed to influence the vote of a voter on any question or office." Id. RSA 659:44-a, which became effective June 18, 2003, provides for misdemeanor penalties for any public employee who electioneers while in the performance of the employee's duties, including the use of government property or equipment to influence any voter.

Correspondence in the NCWP files shows that prior to the next election in 2003, precinct attorney Dewhurst wrote to the precinct moderator, Mr. Kim Perkins, about the impermissibility of candidates being involved in election process and about the prohibition of electioneering.

Throughout our investigation of these matters, we have conferred with SAAG Fitch, the attorney in the civil bureau who is responsible for election matters. We have concluded that the reports do not provide evidence of specific behavior that would constitute electioneering during the election itself.

RSA 659:44-a was not in effect during the 2002 election, and therefore the reported use of the precinct facilities, equipment and materials to prepare campaign

materials can not be prosecuted.[7] If precinct paper and other supplies were used for the election purposes, that would constitute a theft.

Because of the totality of the circumstances, we decline to prosecute any criminal charges related to 2002 election activities.

12. Water System Backflow Prevention Inspection

The MRI report alleged multiple violations of RSA 485, the Safe Drinking Water Act, and the related administrative rules. Under RSA 485, the precinct is required to have backflow prevention devices on water connections to high-risk users, and to have these devices inspected twice each year by a certified inspector. Documentation of the inspections must then be sent to the state at the Department of Environmental Services (DES). Under RSA 485:16, violations of the inspections sections of the statute are misdemeanors for individuals and felonies for others. NCWP users are charged $35.00 for each inspection, and that fee goes to the precinct.

In the recent past, the precinct had employed one certified inspector, Mike Galligan. There are numerous reports that Galligan had health problems that affected his work performance. McKinney told Cantwell that in July of 2001, Chandler ordered him to start doing inspections along with Galligan. McKinney, who was not certified, stated that eventually he simply split the list of sites to be inspected and performed many of the inspections without Galligan. McKinney would return to the precinct at the end of the day with his inspection reports and Galligan would sign the

[7] Attorney Dewhurst's letter to the commissioners refers to the precinct employee handbook and the policies therein concerning campaign activities by employees. A violation of those policies does not by itself constitute a criminal violation, we therefore do not address whether any of those policies were violated.

reports. There were at least 114 devices inspected in this manner. The water users paid for this testing. The test results were forwarded to DES. McKinney said that Chandler and the other precinct employees were aware that he was doing this and joked about it. Hill told MRI that everyone knew Galligan was signing off while McKinney was really doing the inspections. Kris Cluff also heard joking about McKinney doing all the work for Galligan.

In January 2002, citing Galligan's health problems, Chandler again instructed McKinney to do the inspections with Galligan. After Galligan was no longer employed, McKinney said that Chandler told him to do the inspections despite not being certified, and to rely on his (Chandler's) certification, which he indicated he would renew.[8] Chandler later told McKinney that he had not renewed his certification. McKinney said he refused to do the inspections until he (McKinney) became certified in February 2003. (For several months in 2002, no one performed the inspections.) McKinney also said that Chandler had proposed that McKinney do the inspections and that Galligan be contracted for the purpose of signing off on the inspections.

In his September 30, 2003 letter to the commissioners, Chandler wrote that when he became aware that Galligan was behind on the testing, he assigned McKinney to work with him to get the inspections completed. He said that it was his understanding that the testing was being done under Galligan's supervision and control. He said he did not learn that McKinney was testing without Galligan until

[8] Records from New England Water Works Association show that Chandler had been certified in 1986 but was not presently certified.

July 2003, and that when he learned of this practice, he stopped it. Chandler stated that Galligan, after his employment ended, had offered to sign off on tests performed by McKinney, but that since this would not comply with regulations, Chandler did not use this procedure.

Chandler told Cantwell that in 2000 or 2001 he assigned McKinney to assist Galligan after reporting the Galligan situation to the commissioners in a non-public session. He said that he asked McKinney to get licensed for the testing, but that McKinney refused. He knew that in a few cases where Galligan had physical difficulty getting to a device, McKinney would perform the test under Galligan's supervision. He said that until the investigation began, he did not know that McKinney was doing the testing without Galligan present. He denied hearing jokes about McKinney doing Galligan's work. He said his own certification was expired. He said that a DES official told him that having a certified person watch the uncertified person do the testing was not a violation of the regulations.

Chandler told McLane that Galligan and McKinney were probably not always going to do the inspections together and that he did not see a problem with Galligan signing off on inspections that McKinney had done.

Galligan told Cantwell that he trained McKinney and McKinney initially worked with him, but that at the end of his time at the precinct, McKinney had worked on his own and would simply report test results, and he would sign the forms with McKinney's results reported. Galligan said he assumed that Chandler knew he was just signing off on the tests done by McKinney, but he did not recall any specific conversations with Chandler about this. Galligan said that he had not talked to

anyone about signing off on anyone's inspections after leaving precinct employment in June 2002.

Former commissioner Forbes told Cantwell that Chandler had informed the board that Galligan had difficulties completing the testing and that the board approved assigning McKinney to assist Galligan. He said that at that time, he did not know that McKinney had done any testing without Galligan. Former commissioner Preece said he did not know about the testing done by McKinney until he was questioned in the McLane investigation.

After learning about these violations, in July 2003, the McLane law firm sent a letter to DES voluntarily disclosing the violations and stating that the situation had been remedied. In October 2003, DES sent NCWP a "Notice of Past Violation and Request for Information" stating that the facts showed violations of administrative rules. DES asked for additional information and stated that if the documentation supported the facts set out by McLane, they would take no administrative action on the violations at that time. DES pointed out that any <u>future</u> violation might result in an administrative order, or fine proceedings, or referral to the Department of Justice for other appropriate penalties.

RSA 485:11 requires the precinct to test the backflow devices twice each year. Administrative Regulations Env-Ws 364.01-.08 specify that the testing must be done by a certified person, that the water supplier has a duty to ensure that the certified person performs the inspections, and that the inspector must report the results of the testing to DES. Under RSA 485:16, violations of RSA 485:8-13 and the corresponding administrative regulations constitute a misdemeanor for individuals,

and a felony for an organization. We have reviewed the documentation of the testing, including the records of the tests performed by McKinney and signed by Galligan. These documents could support misdemeanor charges under RSA 485:11 and :16 against Chandler, Galligan, and McKinney, and a felony charge against the precinct.

Here, the precinct, through its attorneys, came forward and self-reported the violations, and there is no evidence any health hazards were created by the violations. In February 2003, two precinct employees became certified to perform the testing, and the testing resumed. We have consulted with the Environmental Bureau of the Attorney General's Office, the bureau which normally would prosecute cases of this nature. Under these circumstances, where NCWP "self-reported" the violations, and there is no evidence of further violation, the Attorney General's Office declines to pursue criminal charges for violations of RSA 485.

There has been a concern raised that because users paid for the uncertified testing, collection of the inspection fees constitutes a theft from the water customers. However, in this case, the inspections were actually performed, albeit by an uncertified inspector, and the fees went to the precinct, not for any person's individual gain. The affected customers were later given a credit for the uncertified testing. Although the uncertified inspections were violations of administrative regulations, this fact does not transform the acceptance of the fees into a theft.

There is also a question of whether the submission of the inspection reports constitutes the misdemeanor of tampering with public records under RSA 641:7 for knowingly making a false entry in a record kept for the information of the government. Here there is evidence that Chandler, Galligan, and McKinney all knew

that Galligan had not done the testing as reported to DES. Additionally, under RSA 638:3, a person is guilty of a misdemeanor if, knowing he has no privilege to do so, he falsifies any record, public or private, with a purpose to deceive or conceal any wrongdoing. A knowing falsification of such inspection records with the purpose to deceive DES about who performed the inspections would constitute a violation of this statute. Further, under RSA 626:8, a person could be an accomplice to the falsification if he solicited and/or aided another in committing the falsification.

The conflicting evidence between Chandler and McKinney regarding these inspections warrants against initiating criminal charges for falsifying public records. McKinney claims that Chandler ordered him to complete the inspections without being certified. If true, McKinney and Galligan may have a complete statutory defense and legal justification for executing the forms under RSA 627:2, II. Chandler denies this accusation, and he claims that he believed all testing was being done under Galligan's supervision and control. Galligan's account does not completely support either McKinney's or Chandler's statements. Galligan stated that he assumed Chandler had approved the arrangement. Given these irreconcilable accounts, the State would be unable to prove a charge of knowingly falsifying public records beyond a reasonable doubt.[9]

13. Criminal Threatening and Witness Tampering

A. The Allegations

[9] A copy of this report is being forwarded to the New England Water Works Association for its consideration concerning the future certification of the individuals involved.

McKinney told Cantwell that Joe Smith was an ally of Gary Chandler and that Smith had been harping on him and on Art Hill about what they were saying to the McLane and MRI investigators. McKinney reported that he received a message on his cell phone on September 25, 2003. We obtained a copy of the recorded conversation. The caller did not identify himself, but McKinney believed the voice was that of Joe Smith. The speaker, using southern "moonshine" speech and allusions, said he wondered if McKinney could be trusted, that McKinney might not want to hang around with lawyers and political activists, and that the "boys" were "on to you."

McKinney reported that on October 30, 2003, at about the time that the MRI report was being completed, Joe Smith said, "Just so you know, Shane, I was the one that set Mike [Galligan] up this morning for DWI, and Dewhurst is next, and if you don't pick a side soon instead of this neutral stuff, I am going to set you up next." McKinney said that employees Roger Woodward, Mark Ewing and Artie Hill were present at the time. Woodward, Ewing and Hill all told Cantwell that they did not remember such a conversation.

McKinney also stated that on October 31, 2003, Joe Smith told him that Kris Cluff had made a complaint to the Bar Association against Attorney Greg Smith. Joe Smith said that he too was going to make a call to the Bar Association about Attorney Smith's actions, and that Attorney Smith "will regret taking on this native redneck."

Also on October 31, McKinney reported that he twice saw Joe Smith drive by the Dewhurst home where Dewhurst was having a bonfire at a party for one of his children. On the following Monday at work, Joe Smith commented to McKinney

about seeing McKinney put wood on the bonfire. McKinney believed that Smith could not have seen the fire from the road, and that it would be necessary for him to go into the woods and a field to see the bonfire.

After the MRI report was released, on or about November 20, 2003, several newspaper clippings were pinned to a bulletin board at the precinct. One clipping was about Galligan's arrest for transporting alcohol. Another was a headline, "Fired worker kills six at warehouse." Another was an article entitled, "How to Select a Consultant for Optimal Results."

In November 2003, a toy rat was passed around the precinct office. Hill said that Joe Smith would point the rat at McKinney and squeak it, and that McKinney had taken the squeaker out. Hill said that Smith put it on the seat of McKinney's truck. Hill said that McKinney was upset and set the rat on fire. McKinney told Cantwell about the squeaking rat incidents. He said he found the rat, partially burned, on the front seat of his truck.

Cantwell interviewed Chandler on May 11, 2004. The next day, Chandler went to the precinct offices and paid his water bill. He spoke to Kris Cluff and told her that Cantwell had asked about her saying that money from one project was being used for engineering on another project. Cantwell interviewed Cluff on May 14, and she confirmed the encounter but reported that Chandler was not angry and did not try to influence her in any way.

In June 2004, after public controversy about the various investigations and leaks of information, McKinney reported that Joe Smith leaned over a table at NCWP and said that he was "this close" (hand gesture of inches) to coming across the table

and punching McKinney out. When Cantwell interviewed McKinney, he learned that prior to this incident, Smith had been upset at McKinney over a conversation with a hydrant salesman.

In another incident, McKinney reported that Roger Woodward, the water foreman, told him that he should discontinue giving information, presumably to the investigators. The report of that conversation indicates that what Woodward said could be interpreted as advice by a supervisor to a subordinate, and that Woodward believed that McKinney was being untruthful. There was no indication that Woodward asked McKinney to lie to investigators.

A precinct resident wrote to the Attorney General reporting that the resident had been the target of anonymous letters and faxes after speaking out against Chandler's rehiring.

B. Legal Analysis

Under RSA 631:4, a person is guilty of criminal threatening if, by physical conduct, he attempts to place another person in fear of imminent bodily injury, or if he threatens to commit a crime against a person with a purpose to terrorize any person. Here, there is evidence that Smith verbally threatened McKinney by saying, "… if you don't pick a side soon … I am going to set you up next." However, where the other persons reported to be present do not remember hearing this, it would be difficult to prove beyond a reasonable doubt that the event occurred.

Smith is also alleged to have made a threat by saying he was "this close" to coming across the table and punching out McKinney. A criminal threatening prosecution for this conduct is hampered, however, because Smith indicated he was

close to attacking McKinney, thus undercutting the proof necessary to establish that Smith's purpose was to place another in fear of *imminent* bodily injury. Further, there is evidence that Smith had been upset with McKinney at the time concerning McKinney's recent interaction with a hydrant salesman. Thus, it is equally plausible Smith's words were motivated by work-related issues rather than McKinney's involvement in the investigation of NCWP.

Under RSA 641:5, a person is guilty of the felony of witness tampering if the person, believing that an official investigation is pending, attempts to cause another person to inform falsely or withhold any information, or if he commits any unlawful act in retaliation for another because the other person acted as a witness or informant. Here, Smith's comments to McKinney, Chandler's comments to Cluff and the anonymous letters to the resident may have been witness tampering.

However, in a witness tampering prosecution, it is unlikely the State could prove beyond a reasonable doubt that Chandler or Smith's purpose was to cause a witness to withhold information or inform falsely, as opposed to having the intent to harass without such a purpose. Nor could the State prove that Smith or Chandler committed "unlawful" acts in retaliation for a witness's statements to investigators. While this conduct was ill advised, distasteful and should not be condoned by the precinct, in this office's discretion, criminal charges will not be pursued.

14. <u>Payment of Wages for Time Not Working</u>

The MRI report alleged that there was poor management and control over personnel utilization and deployment. The MRI report states that it was impossible to determine if employees actually worked on any given day. There were other

allegations that some employees were not working while they were being paid, and allegations that some employees were being paid overtime for hours not worked.

Cluff told Cantwell that there was no time clock and that in the past employees did not sign their time cards. Employees now complete a daily time sheet.

Galligan said that employees would try to get away with things like going skiing during a workday. He said no one knew what others were doing, and that if someone was caught, he would take a sick day.

Under RSA 637:4, a person commits theft by deception if he obtains the property of another by deception with a purpose to deprive the other of the property. Thus, if an employee receives pay for time he did not work by deceiving the employer into believing he was working, he has committed theft.

Our investigation did not reveal allegations of specific employees receiving pay for time not worked. Accordingly our investigation did not include an examination of all employee time records as there was insufficient evidence of specific instances of conduct to warrant such an inquiry. Thus, there is insufficient evidence to prove that any employee committed theft of pay for hours not worked.

15. <u>Budget Matters</u>

In September 2004, Karen Umberger, a precinct voter, wrote a letter to the Department of Revenue Administration (DRA) with a copy to our office alleging that the commissioners had flaunted the law in acting on certain appropriations. At the 2004 annual meeting, voters enacted several articles intended to limit the commissioners' discretion in spending precinct funds, especially for legal expenses.

In Ms. Umburgers's opinion, some commissioners have not followed through or have disregarded these articles, and are guilty of financial mismanagement.

The commissioners have received advice on these matters from their general counsel, Attorney Dewhurst, and in some instances, also from the McLane law firm. They have also had continuing conversations and correspondence with DRA officials. Although these actions may be controversial, there is no evidence of violations of criminal statutes.

16. Other Matters

The MRI report, the PAGG letter, Gary Chandler in his interview with Cantwell, and other witnesses alleged numerous other instances of wrongdoings by commissioners, the superintendent, employees and/or others. These claims concern alleged violations of the Municipal Budget law, violations of the right-to-know law, disparate treatment of precinct customers, improper releases of information, improper meetings between commissioners and attorneys, improper interference with precinct matters by commissioners and employees, incomplete investigations by other entities, improper votes by commissioners, and more. Many of these allegations, even if proven to be true, and even if violative of civil regulations or good business practices, would not constitute violations of criminal law, and therefore are not addressed in this report.

There were also allegations of other acts that could constitute criminal violations, but little or no evidence was presented supporting the allegations, and therefore such claims are not addressed in this report.

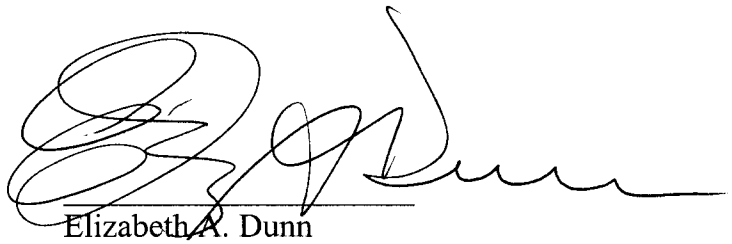
This report does not recite all the facts learned in the course of the investigation. In many cases, the same facts were reported by multiple witnesses, and, for the sake of brevity, not all of the witnesses were listed in this report. In some cases, conflicting facts were reported by witnesses, but were not directly relevant to the potential criminality of the matter.

The purpose of this investigation and report has been to determine if there is evidence that any identified person has committed any criminal act relative to the operation of NCWP, and if so, what -if any- criminal charges should be brought. The investigation was not intended to determine whether or not NCWP has been managed in accordance with civil statutes, administrative rules, good ethical standards or good administrative practices.

17. Conclusion

The management practices of Gary Chandler fostered a working environment at NCWP that was ripe for potential abuse. Although there is insufficient evidence to prove criminal conduct beyond a reasonable doubt, our investigation revealed many instances of poor oversight, preferential treatment and questionable handling of public funds. A careful examination of the circumstances resulting in this investigation is necessary. Additionally, the customers of NCWP may benefit from further public and legislative attention to the most appropriate legal structure, administration and future oversight of the NCWP.

We hope that this report will assist NCWP in going forward with the provision of its important services to the residents of the precinct.



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Assistant Attorney General
February 22, 2005

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